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Electronic Arts ("EA") has had some legal issues lately. They've beaten former NFL running back Jim Brown and former Rutgers quarterback Ryan Hart in lawsuits over the use of the players' likenesses in EA's *Madden* and *NCAA Football* video games. They also lost a similar case against quarterback Sam Keller in the District Court of California. Appeals for the Hart and Keller cases are currently pending before the Third and Ninth Circuits respectively. Those players all claimed that they had a right to their own likeness and reputation under the Right of Publicity. But the right to one's own likeness is one thing. Can that right extend to the likeness of one's property and brand as well? Now, Electronic Arts is taking a preemptive strike against lawsuits making that very allegation. But if courts take the path that EA is seeking in their decisions they will be allowing First Amendment protections to go much too far.

In the California case of *Electronic Arts v. Textron Inc.*, the video game company sought a declaratory judgment in it this matter regarding its unlicensed use of Bell helicopters' "Viper," "Venom," and "Osprey" military helicopters in its recently released *Battlefield 3* video game. These helicopters, officially known as the UH-1Y, AH-1Z, and V-22 respectively, are both plainly visible and available for interactivity when players take on specific flight and combat missions. EA argues, among other things, that it is entitled to First Amendment protection for this use. Bell helicopters struck back by filing a case in the Northern District of Texas alleging trademark infringement against the game maker. Bell states that EA took what was not its own and by profiting off of Bell's products it will "reap what it has not sown."

EA's anticipatory strike was seemingly an attempt to take advantage of the decision in yet another lawsuit attacking one of EA's games. In the Indiana case of *Dillinger, LLC v. Electronic Arts*, the court chose to apply the Second Circuit's Rogers test to deal with this particular question of First Amendment protection, in a case involving EA's use of the name "Dillinger" to describe the Tommy guns made famous largely by the gangster of the same name. The test, developed in the case of *Rogers v. Grimaldi*, states that the use of a trademark name in a creative or literary work (which under Indiana law includes video games) is only unprotected if it falls under one of two categories. The first is if the use is completely unrelated to the work itself, while the second forbids the use if it is "simply a disguised commercial advertisement for the sale of goods or services." The court found that the "Dillinger" guns fit neither of these

categories and was therefore entitled to First Amendment protection. It is unclear whether, the California and Texas courts will apply this same test, but to do so would be a mistake.

Many video games, including *Battlefield 3*, are particularly compelling and successful because of their ability to imitate real life as closely as possible. Literary works are not as dependent on realism as modern video games are. While a particular realistic detail in a book is unlikely to inherently enhance the experience, one cannot say the same about a realistic video game element which a player and interact with in an environment that simulates real life. The video game maker can profit by using that realism to draw players in. It is true that under the *Rogers* test, Textron's case will probably fail. The use of military helicopters in a game that deals with combat and military action is certainly not unrelated. And while the overall realism promoted by the presence of genuine Bell helicopters is a great selling point for EA, it is hard to see that rising to the level of a misleading advertisement or endorsement of the game as the second prong of the Rogers test seems to require. This is why that particular test is inappropriate.

Intellectual property should be protected, and the blatant pilfering of a brand or product without changing anything about the way it is presented or used has not been and should not be tolerated on policy grounds. Activision, the makers of *Guitar Hero*, entered into an exclusive license to allow for the use of Gibson brand guitars in its game.[1] Electronic Arts itself, for example, uses a number of car-related trademarks and brands for its *Need for Speed* video game series. In both of those instances, the game makers acknowledged the need to go through the owners of the intellectual property needed for the game and took the appropriate steps to obtain access to it. Applying the *Rogers* test could potentially torch this process and allow a free-for-all regarding companies seeking realism in their video games. Though the test's application may be justified in a legal sense, it is not as a matter of policy and appropriateness. As realism in video games continues to become more important, the line will have to be drawn as to what deference should be allowed to owners of intellectual property. That line needs to be drawn somewhere, and the folks at Textron who hold those rights can only hope that the court here can see that the answer is as clear as a "Bell."

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[1] Activision explicitly states that with regard to the Guitar Hero games, "[a]ll Gibson marks, logos, trade dress, guitar models, controller shapes, and related rights provided pursuant to exclusive license from Gibson Guitar Corp."